



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 24, 1998

Mr. Lee Haney
District Attorney
35th Judicial District of Texas
Brown County Courthouse
Brownwood, Texas 76801

OR98-1036

Dear Mr. Haney:

You have requested our opinion as to whether a former county employee who met with the Brown County Commissioners Court (the "court") during an executive session to discuss his termination, may review and copy the audio tape of that portion of the executive session during which he was present. We understand that, pursuant to section 551.074 of the Government Code, the Open Meetings Act, the court held an executive session to discuss, among other things, the employee's termination. The executive session was tape recorded pursuant to section 551.103(a), which provides in relevant part that "[a] governmental body shall either keep a certified agenda or make a tape recording of the proceedings of each closed meeting."

You ask about the effect of Attorney General Opinion DM-227 (1993), in which the attorney general concluded that the Open Meetings Act and the Open Records Act do not preclude "a member of a governmental body from reviewing the certified agenda or tape recording of a closed meeting in which the member had participated." Attorney General Opinion DM-227 (1993) at 2. The opinion further stated that although a tape recording of an executive session is confidential pursuant to section 551.104(c) of the Government Code, a review of the tape by a member of the governmental body is not considered to be a release to the public, and therefore, does not breach the confidentiality of the tape. *Id.* at 2.

This office has recently concluded, however, that a governmental body may not permit a member of the body to copy for his or her own use a tape recording of an executive session of a meeting in which he participated. Letter Opinion No. 98-033 (1998). In that opinion, this office stated that

were a governmental body to permit one board member to copy the recording, it could hardly deny any member the right to do so, and the risk of unauthorized release may be expected to increase exponentially with each duplication. . . . If the legislature had intended to allow members of a governmental body to copy a tape recording of an executive session, we believe it would have expressly authorized them to do so, subject to precise restrictions on use and dissemination of the copies.

Thus, although a governmental body may permit its members to have access to and review the tape recording of a closed meeting, the Open Meetings Act precludes members of a governmental body from making extra copies of a tape recording of an executive session. We now address your question in the context of these two opinions.

Under the facts presented to us here, the person requesting to review and copy the tape is a former county employee. You suggest, however, that the conclusion in Attorney General Opinion DM-227 implicitly permits this former employee to review and copy the tape recording merely because he was present at the closed meeting. You contend that *release to this individual under these circumstances does not constitute a release to the general public*, and, therefore, does not compromise the confidentiality of the tape recording.

In our opinion, the conclusion of Attorney General Opinion DM-227 does not apply in this instance. That opinion was premised on the fact that a member of the governmental body requested access to the tape. In order to carry out his official duties, a member of a governmental body must have complete and unfettered access to records maintained by the governmental body. Attorney General Opinion JM-119 (1983) at 3. Furthermore, internal nonpublic review of the tape of a closed meeting by a member of the governmental body is not considered a release to the general public. Attorney General Opinion DM-227 (1993). In this case, however, the former employee is not a member of the governmental body, and in our opinion, should be considered a member of the general public for purposes of the Open Meetings Act and Open Records Act. We do not believe, nor does the statute support the conclusion, that his presence at the closed meeting provides him with any greater right of access to the tape recording than any other member of the public.

Section 551.104(c) of the Government Code states that a "certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order." Thus, the court's executive session tapes may not be disclosed to the general public unless a court rules otherwise in an action filed under the Open Meetings Act. Gov't Code 551.104; Open Records Decision No. 495 (1988) (attorney general lacks authority to review certified

agendas or tapes of executive sessions). We do not believe that under the circumstances presented that you are permitted to release the tape of the closed meeting to the requestor.

Yours very truly,

A handwritten signature in black ink that reads "Loretta DeHay". The signature is written in a cursive, flowing style.

Loretta R. DeHay
Deputy Chief
Open Records Division

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